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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 1214

HARRELL G. TILLMAN, ET AL.,
Appellants,

v.

THE CITY OF PORT ARTHUR,
Appellee.

On Appeal from the Supreme Court of the State of Texas

JURISDICTIONAL STATEMENT
(CORRECTED)

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INDEX

	Page
Jurisdictional Statement	1
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	4
Statement of the Nature of the Case	5
The Questions are Substantial	9
Certificate of Service	20

Page

American Surety Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa. et al, 62 S. Ct. 226 (314 U.S. 314) 9, 10

Atascosa County v. City of Pleasanton, 117 S.W. 2d 484 15

Bantam Books, Inc. et al v. Joseph A. Sullivan et al, 83 S. Ct. 631 (372 U.S. 58) 2

Boiles et al v. The City of Abilene, 276 S.W. 2d 922 15

Braun v. Sauerwein, 77 U.S. 218 14

Burton v. Wilmington Parking Authority et al, 81 S. Ct. 856 (365 U.S. 715) 3

City of River Oaks v. Moore, 272 S.W. 2d 389 15

Davis et al v. Coblens, et al, 19 S. Ct. 832 (174 U.S. 719) 2, 9

Griffin v. People of the State of Illinois, 76 S. Ct. 585 (351 U.S. 12) 17

Hanger v. Abbott, 73 U.S. 532 13

Hodge v. Lower Colorado River Authority, 163 S.W. 2d 855 15

Hogan v. Krutz, 94 U.S. 773 14

Largent v. State of Texas, 63 S. Ct. 667 (318 U.S. 418) 2

Liggett Co. v. Baldridge, 49 S. Ct. 57 (278 U.S. 105) 17

Marcus et al v. Search Warrants of Property at 104 East Tenth Street, Kansas City, Missouri et al, 81 S. Ct. 1708 (367 U.S. 717) 2

McDonald v. Hovey et al., 4 S. Ct. 142 (110 U.S. 619) 2, 9

Page

Metlakatla Indian Community, Annette Island Reserve, Appellant v. Egan, Governor of Alaska et al.—Organized Village of Kake et al., Appellants v. Egan, Governor of Alaska, 80 S. Ct. 1321 (363 U.S. 555) 2

Metropolitan Ry. Co. v. District of Columbia, 10 S. Ct. 19 (132 U.S. 1) 2, 9

Miller et al. v. Texas and Pacific Ry. Co. et al., 10 S. Ct. 206 (132 U.S. 62) 2, 9

National Surety Co. v. Western Fire and Indemnity Co., 318 F. 2d 379 10

Platte v. Securities Inv. Co., 55 S.W. 2d 551 10

Preferred Insurance Co., a Corporation et al. v. United States of America, 222 F. 2d 942 10

Tucker v. State of Texas, 66 S. Ct. 274 (326 U.S. 517) 2

United States of America v. United Services Automobile Association, a Reciprocal Insurance Association, 238 F. 2d 364 10

United States v. Munsey Trust Co. of Washington, D. C., 67 S. Ct. 1599 (332 U.S. 234) 9, 10

Texas Statutes

Article 1119; Article 4477-1, Sec. 1(e); Article 4477-1, Sec. 11 (a); Article 5517; Article 5526; Article 5544; Article 7880-125, 1925 Revised Civil Statutes of Texas 4

Federal Statutes

Title 28, U. S. C., Section 1257, subsection 2 2

Title 28, U. S. C., Section 2104 2

Constitution

Fourteenth Amendment to the United States Constitution 3, 8, 16

IN THE SUPREME COURT OF THE UNITED STATES

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NO. 1214

HARRELL G. TILLMAN, ET AL.,

Appellants,

v.

THE CITY OF PORT ARTHUR,

Appellee.

On Appeal from the Supreme Court of the State of Texas

JURISDICTIONAL STATEMENT

(CORRECTED)

Appellants appeal from the final judgment of the Supreme Court of Texas entered on the 19th day of January, 1966, overruling Appellants' Motion for Rehearing from a judgment rendered by the Supreme Court of Texas on the 28th day of July, 1965 and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINION BELOW

The opinion of the Supreme Court of Texas, is reported in 398 S.W. 2d 750 (Official Vol. Texas cases).

JURISDICTION

The final judgment of the Supreme Court of Texas in this case was entered on January 19, 1966, and Notice of Appeal was filed in that court on March 4, 1966.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257, subsection 2, and Section 2104.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Davis et al. v. Coblens et al.*, 19 S. Ct. 832 (174 U.S. 719); *Miller et al. v. Texas & Pacific Ry. Co. et al.*, 10 S. Ct. 206 (132 U.S. 62); *Metropolitan Ry. Co. v. District of Columbia*, 10 S. Ct. 19 (132 U.S. 1); *McDonald v. Hovey et al.*, 4 S. Ct. 142 (110 U.S. 619); *Metlakatla Indian Community, Annette Island Reserve, Appellant v. Egan, Governor of Alaska et al.—Organized Village of Kake et al., Appellants v. Egan Governor of Alaska*, 80 S. Ct. 1321 (363 U.S. 555); *William Marcus et al., Appellants v. Search Warrants of Property at 104 East Tenth Street, Kansas City, Missouri et al.*, 81 S. Ct. 1708 (367 U.S. 717); *Bantam Books, Inc. et al., Appellants v. Joseph A. Sullivan et al.*, 83 S. Ct. 631 (372 U.S. 58); *Tucker v. State of Texas*, 66 S. Ct. 274 (326 U.S. 517); *Largent v. State of Texas*, 63

S. Ct. 667 (318 U.S. 418); *William H. Burton, Appellant v. Wilmington Parking Authority et al.*, 81 S. Ct. 856 (365 U.S. 715).

QUESTIONS PRESENTED

1. Whether Article 5517 of the 1925 Revised Civil Statutes of Texas, as applied to Appellants, denies to them rights secured under the "equal protection clause" and "due process clause" of the Fourteenth Amendment to the United States Constitution, since Appellee succeeded and was subrogated only to the powers, duties, rights, and obligations of the Jefferson County Water Control and Improvement District No. 11 and was Appellee limited in the enforcement of such rights under such remedies, measures, limitations, burdens and disqualifications available to the Appellants against said Jefferson County Water Control and Improvement District No. 11 at the time the cause of action in this case accrued.

2. Whether Article 5517 of the 1925 Revised Civil Statutes of Texas perpetually immunizing the Appellee from the effects of the Statutes of Limitation pleaded by the Appellants under Articles 5526 and 5544, as applied to Appellants, denies to them rights secured under the "equal protection clause" and "due process clause" of the Fourteenth Amendment to the United States Constitution, since the Statute of Limitation had run for a period of ten (10) months against the alleged cause of action after it accrued while owned by the Jefferson County Water Control and Improvement District No. 11, and prior to the date Appellee claims its right to the cause of action was acquired.

3. Whether Article 5517 of the 1925 Revised Civil Statutes of Texas imposes restrictions and burdens upon Appellants and their property which are not imposed upon Appellee and its property while acting in its proprietary capacity and engaged in the same character and type of business, is unreasonable, discriminatory and arbitrary and as applied to Appellants whether it denies "equal protection of law" and "due process of law" secured to Appellants under the Fourteenth Amendment to the United States Constitution.

4. Whether Article 5517 of the 1925 Revised Civil Statutes of Texas perpetually insulating the Appellee while acting in its proprietary capacity against the running of any Statute of Limitation and denies any remedy at all under any Statute of Limitation to Appellants against Appellee engaged in the same type and character of business, as applied to Appellants, denies Appellants rights secured by the "equal protection clause" and the "due process clause" of the Fourteenth Amendment to the United States Constitution.

STATUTES INVOLVED

Article 1119 of the 1925 Revised Civil Statutes of Texas; Article 4477-1, Sec. 1 (e) of the 1925 Revised Civil Statutes of Texas; Article 4477-1, Sec. 11 (a) of the 1925 Revised Civil Statutes of Texas; Article 5517 of the 1925 Revised Civil Statutes of Texas; Article 5526 of the 1925 Revised Civil Statutes of Texas; Article 5544 of the 1925 Revised Civil Statutes of Texas; Article 7880-125 of the 1925 Revised Civil Statutes of Texas. (Text of Statutes involved attached hereto as Appendix C).

STATEMENT OF THE NATURE OF THE CASE

The Appellee filed suit to recover a money judgment from Appellants in the sum of Eighty-nine Thousand One Hundred Sixty-one & 46/100 ($89,161.46) Dollars (R. pp. 1-34), plus One Hundred Thousand ($100,000.00) Dollars as exemplary damages.

One of the Appellants, Mack H. Hannah, Jr., during the years 1947, 1950 and 1951, dedicated certain portions of his land as easements for maintaining utility service lines in the easements. This land was not within the limits of the Appellee. The Appellant, Mack H. Hannah, Jr. had prior to the dedication of the easements, at his own expense, laid water lines in the easements and was furnishing water to the citizens residing on such land. All of this action took place prior to the time the Water District was organized.

The Appellant, Mack H. Hannah, Jr., in the deeds of dedication reserved the title to all pipelines which he had already laid in the easements, or that might be thereafter laid in the easements by him, and reserved the title to such water lines then in the easements and other lines that might be laid by him thereafter, from the title to any parcel or lot of land that he might sell out of the land where the easements crossed. The easement deeds did not convey or dedicate the fee simple title to the land burdened with the easements.

On August 16, 1956 the Appellant Mack H. Hannah, Jr. conveyed all of his interest and title in the easements and water facilities by quitclaim deed to the Appellants

Harrell G. Tillman and his wife, D. D. Tillman (his son-in-law and daughter).

The Tillmans after said date started doing business under the trade name T & T Water Company of Harris County, Texas.

Thereafter, the citizens in the area organized the Jefferson County Water Control and Improvement District No. 11 pursuant to Article 7880-1 of the 1925 Revised Civil Statutes of Texas (Official Vol. 21, p. 407).

For brevity, Jefferson County Water Control and Improvement District No. 11 will be referred to herein as "Water District."

The Water District voted a bond issue and needed the water facilities owned by the Appellants Harrell G. Tillman and D. D. Tillman in order to dispose of the bonds.

The Appellants Harrell G. Tillman and D. D. Tillman agreed to sell the water facilities at the appraised value.

Thereafter, on October 4, 1958, the Water District purchased from Appellants Harrell G. Tillman and D. D. Tillman the water lines and facilities for the sum of Forty-two Thousand Nine Hundred Eighty-seven ($42,987.00) Dollars (the appraised value).

On October 4, 1958, a note was given to the Tillmans for the purchase price, in the sum of Forty-two Thousand Nine Hundred Eighty-seven ($42,987.00) Dollars. On February 11, 1959, the note was paid off and the debt discharged by the directors of the Water District. The Water District ac-

quired under the deed from Appellants Harrell G. Tillman and D. D. Tillman, doing business as T & T Water Company, all of the water facilities, pipelines and attachments and the fee simple title to the easements which did not pass under the dedication.

The Appellee on the 26th day of December, 1959 annexed the area where the water lines, attachments and facilities had been laid by the Appellant Mack H. Hannah, Jr., pursuant to Article 1182-C-1, Revised Civil Statutes of Texas (Official Vol. 2B, p. 166).

The Appellee in this suit based its claim for recovery of the money sued for upon the theory that no title passed to either the water lines or the fee simple title of the easements from the Tillmans to the Water District and that a fraud was perpetrated by the directors of the Water District and the Tillmans to obtain money from the Water District, to which they were not entitled, and that the directors of the Water District conspired with the Tillmans to receive such money fraudulently. That the Appellant Mack H. Hannah, Jr. violated his oath of office as director of the Water District, in that he was doing business for himself with the Water District. That Mack H. Hannah, Jr. owned no interest, right or equity in the water lines and facilities or the fee simple title to the easements and had nothing to convey to the Tillmans and the Tillmans had nothing to convey to the Water District. That the Tillmans were engaged in the distribution of water in violation of the law under the trade name T & T Water Company (R. pp. 1-34).

The Appellants answered by special exceptions that the petition on its face showed the alleged cause of action was barred by the Two-Year Statute of Limitation, pleaded the Two-Year Statute of Limitation, ownership of the water lines by the Appellants-Tillmans at the time they were sold to the Water District, raised in their Answer the constitutional question of denial of "due process of law" and "equal protection of law" secured to them under the Fourteenth Amendment to the United States Constitution. The constitutional questions presented here were again raised in Appellants' Motion for Rehearing before the Supreme Court of Texas (Appendix B hereto attached). That the Water District had the authority to make the contract involved and pay the money. That the contract had been fully performed and the money paid. That the title to the money had vested in the Tillmans prior to the date the Appellee alleged it acquired its cause of action. That the Statute of Limitation had begun to run while the cause of action was owned by the Water District, and that a period of more than two (2) years had expired after the date the cause of action accrued and before the filing of the lawsuit on June 19, 1962. That the Water District had received and accepted the water facilities, used the same, and derived revenue from the use thereof, and that the Appellee at the time it annexed the area took the water lines, attachments, facilities and easements and had used the same and received the revenue obtained therefrom. That the Tillmans in the operation of their water company had purchased water through Water District No. 5 which had obtained the approval of a

certificate from the State Health Department to furnish water to citizens in the area. (R. pp. 36-85, 88-131).

The trial court ruled that the cause of action as pleaded was barred by the Two-Year Statute of Limitation and gave the Appellee leave to amend. The Appellee refused to amend, thereupon, the trial court entered judgment dismissing the case. (R. 133-136).

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are similar to those raised by *Metropolitan Ry. Co. v. District of Columbia*, 10 S. Ct. 19 (132 U.S. 1); *Miller et al. v. Texas and Pac. Ry. Co. et al.*, 10 S. Ct. 206 (132 U.S. 62); *Davis et al. v. Coblens et al.*, 19 S. Ct. 832 (174 U.S. 719); *McDonald v. Hovey* 4 S. Ct. 142 (110 U.S. 619); *American Surety Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa.* 62 S. Ct. 226 (314 U.S. 314); United States v. Munsey Trust Co. of Washington, D.C., 67 S. Ct. 1599 (332 U.S. 234).

1. It is contended by Appellants on this appeal that when the Appellee, City of Port Arthur, acquired the water system owned by the Water District, it abdicated its governmental function and authority in that transaction and was acting in its proprietary capactiy, and in so acting it ceased to have the immunization provided for under Article 5517 against the running of the Statute of Limitation.

The Appellee based its right to bring and prosecute this lawsuit claiming it was subrogated and succeeded to the powers, duties, assets, and obligations of the Water District,

pursuant to Article 1182c-1, subsections 1 and 2, 1925 Civil Statutes of Texas (Official Vol. 2B, pp. 166-167). Therefore, the Appellee stood in the same shoes of the Water District.

The Appellee had the authority to enforce every right owned by the Water District by every remedy available to the Water District under the law. That is the extent of the Appellee's remedies. The measure of Appellee's right is controlled by the right possessed by the Water District. Such right, claim, obligations and cause of action to which the Appellee, City of Port Arthur succeeded were taken subject to the limitations, burdens, defenses and disqualifications existing and available to Appellants while owned by the Water District. Beyond this protection the Appellee had no remedy, right and valid claim for protection.

The issues involved in this appeal are similar to those raised by *United States of America v. United Services Automobile Association, a Reciprocal Insurance Association*, 238 F. 2d 364; *Preferred Insurance Company, a Corporation et al v. United States of America*, 222 F. 2d 942; *American Surety Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa., et al.*, 62 S. Ct. 226 (314 U.S. 314); *United States v. Munsey Trust Co. of Washington, D.C.*, 67 S. Ct. 1599 (332 U.S. 234); *National Surety Co. v. Western Fire and Indemnity Co.*, 318 F. 2d 379; *Platte v. Securities Inv. Co.*, 55 S.W. 2d 551 (Official Vol. Texas Cases only).

When a judicial examination of the record in this case is made, we believe it will be found that the Appellee did not succeed to or acquire any claim, right or cause of action un-

der and from the Water District against the Appellants and held no valid cause of action against the Appellants at the time Appellee filed this lawsuit. Under the rule of succession and subrogation, the very principles of the doctrine are that the Appellee could not succeed to, or be subrogated to, or acquire any claim, right or cause of action which the Water District, under whom the Appellee claimed, did not have. That the extent of its remedies and the measure of its rights are controlled by those possessed and owned by the Water District at the time Appellee claimed it acquired the cause of action, and such rights, claim, and causes of action to which the Appellee succeeded or was subrogated to, if any, were taken subject to the limitations, burdens, disqualifications, and defenses to such claim, rights, and causes of action, while they were owned or held by the Appellee's predecessor, the Water District. Beyond this the Appellee had no valid claim for protection.

2. The Appellants had a remedy against the very cause of action asserted in this case, while it was owned or purported to be owned by the Water District—the Two-Year Statute of Limitation—which began to run as early as August 16, 1956, when the Appellant Mack H. Hannah, Jr. gave the water lines, attachments, and the fee simple title in the easements to the Tillmans, for his gift of his equity in the title and right in the water lines, attachments and his conveyance of the fee simple title to the easements occurred on that date and is asserted as a part of the alleged fraud in this case.

The defense was still available to the Appellants on December 26, 1959 when the Appellee claimed it acquired the present cause of action by succession and subrogation, and on June 19, 1962, when the present lawsuit was filed.

The Honorable Supreme Court of Texas struck down the defense—Two-Year Statute of Limitation—which Appellants had against the Water District, the predecessor in ownership of the asserted cause of action in this case, which defense—Two-Year Statute of Limitation was available to the Appellants against the cause of action after it was acquired by the Appellee.

The Texas Supreme Court extended the immunity and perpetual insulation under the Texas Statute of Limitation Article 5517 to the Appellee (as subrogee) which defense, perpetual insulation, could not be pleaded by the Water District (subrogor). The Supreme Court of Texas thereby created a new remedy in favor of the Appellee which did not exist and abrogated the remedy which Appellants had under the laws of the State of Texas, particularly Article 5526 of the Texas Civil Statutes, to plead the Limitation Statute of two (2) years.

When the applicable law is applied to the facts in the record in this case, we believe it will be obvious that, the Honorable Supreme Court of Texas created a remedy in favor of the Appellee which did not exist and denied a remedy to the Appellants which did exist under the laws of the State of Texas and which Appellants had the right to plead as a defense, thereby denying to Appellants

"equal protection of law" and "due process of law" secured to Appellants under the Fourteenth Amendment to the United States Constitution.

The alleged cause of action accrued against the Appellants at the time the water facilities were sold by the Tillmans to the Water District under the claim of the Appellee and at the time the note was made and the money was paid to the Tillmans by the Water District, which was on October 4, 1958, and on February 11 and February 13, 1959.

3. The Supreme Court of Texas found and held that the Statute of Limitation had run for at least ten (10) months against the cause of action from the date it accrued while owned by the Water District and prior to the date the Appellee claimed it acquired the present cause of action. The Water District was not insulated against the Statute of Limitation under Article 5517.

There is nothing in Article 5544 of the 1925 Revised Civil Statutes of Texas that specifically exempts the Appellee from the running of the Statute of Limitation which had already begun to run before the Appellee owned the cause of action and was entitled to sue.

The provisions of the Article (5544) are very specific:

> "When the law of limitation shall begin to run, it shall continue to run, notwithstanding any supervening disability of the party entitled to sue or liable to be sued."

The issues here raised are similar to those raised in *Hanger v. Abbott*, 73 U.S. 532; that is, that exceptions in the

Statutes of Limitation are framed to prevent injustice and never to encourage laches.

Article 5544 is an exception to Article 5517, and such Article does not insulate, expressly or specifically, the Appellee from the running of the Statute of Limitation when the Statute of Limitation has already begun to run against a cause of action subsequently acquired.

The issues here presented are important to the Appellants and to the business of the water industry in Texas.

Citizens of Texas are given the privilege to incorporate water districts for the purpose of furnishing water to Texas citizens.

Article 4477-1, Sec. 1, subsection (e), and Sec. 11, subsection (a) of Article 4477-1, 1925 Revised Civil Statutes of Texas (Official Vol. 12A pp. 400 and 405) gives authority to any agent or individual, public or private, to furnish water for human consumption. This same right is given to Texas citizens under Article 1119, 1925 Revised Civil Statutes of Texas (Official Vol. 2A, p. 665).

The issues involved in this appeal, that is, where the Statutes of Limitation has begun to run against a cause of action, did a subsequently intervening disability stop the running of the Statute of Limitation, even though the disability is expressly recognized in the Statute itself, were raised in the following cases: *Braun v. Sauerwein*, 77 U.S. 218; *Hogan v. Krutz*, 94 U.S. 773.

As we understand the decisions in these cases, the court held in each case that such intervening disability would not interrupt the running of the Statute.

4. When the City of Port Arthur stepped aside from its governmental function and acted in its proprietary capacity in acquiring the facilities of the Water District under the Texas law, it was governed by the same rules which govern individuals in such matters.

This issue was raised in the case of *Atascosa County v. City of Pleasanton*, 117 S.W. 2d 484 (Official Vol. Texas Cases only).

5. The issue here raised, that is, whether the Appellee at the time it acquired the alleged cause of action was acting in its proprietary capacity under the Texas law, was raised in *Helen Sartain Boiles et al v. The City of Abilene*, 276 S.W. 2d 922 (Official Vol. Texas Cases only); *City of River Oaks v. Moore*, 272 S.W. 2d 389 (Official Vol. Texas Cases only); *Hodge v. Lower Colorado River Authority*, 163 S.W. 2d 855 (Official Vol. Texas Cases only).

6. The Tillmans had a right under the Fourteenth Amendment to the United States Constitution to sell their property for whatever price they desired to sell it for to the Water District and for whatever price the Water District was willing to pay.

The sale was consummated at the time the deed was executed and delivered to the Water District and the note executed, delivered and received as consideration therefor by the Tillmans. The whole transaction was ended on Feb-

ruary 11 and 13, 1959. At the time the deed was executed and delivered to the Water District the equity and title that the Tillmans had in the water facilities and fee simple title to the easements vested in the Water District and the title to the money paid to the Tillmans at the same time vested in the Tillmans.

The Water District had a right to purchase the fee simple title to the easements and the water lines and facilities under Article 7880-125, 1925 Revised Civil Statutes of Texas (Official Vol. 21, pp. 534-35).

In the present suit, the Appellee, City of Port Arthur sought to have the title to the money paid the Tillmans by the Water District for the water lines, facilities and fee simple title to the easements divested out of the Tillmans and vested in the City of Port Arthur (Appellee) in violation of rights secured to the Tillmans under the Fourteenth Amendment to the United States Constitution, in that at the time such contract and sale was made between the Tillmans and the Water District, the Appellee had no right, interest or title in the subject-matter of the deed and contracts between the Tillmans and the Water District and had no cause of action, and claimed none, but by its suit sought to extend its powers beyond its territorial limits and to destroy valid and subsisting contracts made between the Tillmans and the Water District over which it had no jurisdiction, and to take the property of the Tillmans (money re-

ceived from the Water District) without any compensation therefor.

7. The business the Tillmans and the Water District were engaged in was the same type and character of business that the Appellee was engaged in—the furnishing of water to citizens of Texas for human consumption.

Hence, the Appellants, the Water District and the Appellee, City of Port Arthur, were all in the same class of business—therefore, the State of Texas could not single out the Appellants, and the Water District in their dealings and impose restrictions and limitations upon Appellants and the Water District by law, which conditions, burdens, restrictions and liabilities were not placed upon the Appellee, who was engaged in its proprietary capacity in the same type and character of business.

The issues involved in this appeal are similar to those raised by *Louis K. Liggett Co v. Baldridge*, 49 S. Ct. 57 (278 U.S. 105); that is, that the State of Texas under disguise of protecting the public cannot arbitrarily enact laws interfering with private business of the Appellants or impose unreasonable and unnecessary restrictions upon Appellants and give to their competitor Appellee, engaged in the same class and type of business, complete insulation from the restrictions, burdens and interference placed upon Appellants.

The issues raised on this appeal are similar to the issues raised by *Griffin v. People of the State of Illinois*, 76 S. Ct. 585 (351 U.S. 12); that is, that the Article (5517, 1925 Revised Civil Statutes of Texas) may appear non-discriminatory on its face but be grossly discriminatory in its operation against the Appellants in the operation of the same type and character of business that the Appellee, City of Port Arthur was engaged in at the time the alleged cause of action accrued.

When the judicial mind is focused upon the provisions of Article 5517, 1925 Revised Civil Statutes of Texas, it will be perceived that Appellee is perpetually sheltered and immunized by the provisions thereof against the running of the Statutes of Limitation and all remedies are taken from the Appellants under the Statutes of Limitation while engaged in the same type and character of business, and burdens, impositions and restrictions are placed upon the Appellants when such restrictions, limitations, liabilities and burdens are not placed upon the Appellee. The operation of such Statute and the application thereof as applied to the Appellants in the cause of action alleged in this case is grossly discriminatory, unreasonable and unsubstantial and bears no substantial relation to the subject-matter.

Therefore, the final judgment of the Supreme Court of Texas in this case, as applied to the Appellants, denies to them "equal protection of law" and "due process of law" secured to them under the Fourteenth Amendment to the United States Constitution.

We believe that the questions presented by this appeal are substantial and are of public importance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. J. Durham, one of the attorneys of record for Harrell G. Tillman, D. D. Tillman, Hamilton Paul, Emily Bridges, Isaac Prejean, Frank Boutte, and Mack H. Hannah, Jr., Appellants herein, certify that on the 21 day of April, 1966 I served a true and correct copy of the foregoing corrected Jurisdictional Statement upon the City of Port Arthur, Appellee herein, by delivering the same by Certified Mail, with proper postage prepaid, to the Honorable George B. Wikoff and the Honorable Cary Young, counsel of record for said Appellee, City of Port Arthur, located at the City Hall, in the City of Port Arthur, Texas (P. O. Box No. 1089, Port Arthur, Texas).

W. J. Durham

W. J. Durham

APPENDIX A

FINAL OPINION AND JUDGMENT OF THE SUPREME COURT OF TEXAS

Petitioner, City of Port Arthur, as successor and subrogee to the rights of Jefferson County Water Control and Improvement District No. 11, brought suit against respondents, Harrell G. Tillman and wife, D. D. Tillman, Mack Hannah, Jr., Hamilton Paul, Emily Bridges, Isaac Prejean and Frank Boutte. As an incorporated city in the state of Texas, petitioner alleged that it had annexed the above-mentioned water district on December 26, 1959, pursuant to Article 1182-C-1, Vernon's Ann. Civ. Stats. It succeeded to the powers of the district as well as to its assets and liabilities and was charged with the duty of performing all of its functions and services. On March 20, 1962, petitioner allegedly discovered the fraud of the Tillmans practiced upon its predecessor, the water district, on February 13, 1959, some ten months earlier than the formal annexation by the city. The city, as subrogee, filed this action on June 19, 1962, also alleging that the respondents Hannah, Paul, Bridges, Prejean and Boutte, as directors of the Jefferson County Water Control District No. 11, had violated and breached various of their statutory duties as trustees and directors of said district and were liable in damages for such actions on their official bonds in the amount of $5,000 each.

The respondents in reply to said pleading filed special exceptions urging the two-year statute of limitations, asserting that petitioner's pleadings upon their face showed

that the City of Port Arthur's alleged cause of action against said respondents was barred by the two-year statute of limitations. The trial court after hearing sustained said respondents' special exception urging the two-year statute of limitations. The City of Port Arthur refused to amend, whereupon the trial court dismissed its suits against the respondents. The City of Port Arthur appealed to the Court of Civil Appeals, which affirmed the judgment of the trial court. 382 S.W. 2d 138.

We hold that the trial court and the Court of Civil Appeals erred in sustaining respondents' special exceptions urging the two-year statute of limitations, Article 5526 (Title 91), Vernon's Ann. Civ. Stats., against the petitioner, the City of Port Arthur.

The two-year statute of limitations as to the incorporated City of Port Arthur is not applicable in this case because of Article 5517, Vernon's Ann. Civ. Stats., which is as follows:

> "*The right of the State, all counties, incorporated cities and all school districts shall not be barred by any of the provisions of this Title*, nor shall any person ever acquire, by occupancy or adverse possession, any right or title to any part or portion of any road, street, alley, sidewalk, or grounds which belong to any town, city, or county, or which have been donated or dedicated for public use to any such town, city, or county by the owner thereof, or which have been laid out or dedicated in any manner to public use in any town, city or county in this State." (Emphasis added.) See Article 5517, Vernon's Ann. Tex. Stats.

In the case of *Brazos River Authority v. City of Graham*, 354 S.W. 2d 99 (1961), we wrote the following:

> "The Title referred to in said Article 5517 is Title 91 relating to Limitations. The Authority argues that the Legislature meant to refer to Chapter 1 of Title 91 which contains only the limitation articles relating to suits for land. This brings to mind the maxim that 'If Parliament does not mean what it says, it must say so.'[3] Newton v. Barnes, Tex. Civ. App., 150 S.W. 2d 72 wr. ref. If we were to approach the problem from the standpoint of the wisdom of the Legislature enactment, we could perhaps conclude that the Legislature may have had real property limitations only in mind. But this is an approach which may not be employed by the courts. We may not invade the legislative field. 50 Am. Jur., 212 §228. There is nothing ambiguous or uncertain about the literal meaning of the Act and hence no need to explore its legislative history. The Act simply states that, 'The right of the State, all counties, incorporated cities and all school districts shall not be barred by any of the provisions of this Title, * * *.' Article 5526 is a part of the Title of the Revised Statutes referred to. 'The rule permitting departure from the literal meaning has no application at all where the statute is unambiguous and embodies a definite meaning and the intention of the legislature as expressed in the law is reasonably free from doubt.' 50 Am. Jur. 239, Statutes, §241. The amended act has remained on the statute books unchanged in wording since 1953, and we are not at liberty to depart from the literal meaning of the article at this time.

As applied to this action, since the two-year statute of limitations falls within Title 91, petitioner is not barred from brnging this suit against any of the respondents on petitioner's various theories as set out above. When the petitioner formally annexed the water district and became

subrogated to its rights, only some ten months of the limitation period had run against the water district. Article 5517 applied to the petitioner at that time and the two-year statute of limitations does not apply.

The judgment of the Court of Civil Appeals and the trial court is reversed and the cause is remanded to the trial court for trial.

Opinion delivered:
July 28, 1965

On motion for rehearing respondents have raised the point that even if Article 5517, Vernon's Annotated Civil Statutes, does prevent the two-year statute of limitation, Article 5526, Vernon's Annotated Civil Statutes, from barring petitioner's alleged cause of action, that Article 5544 will bar the city's cause of action. Article 5544 is as follows:

> "The period of limitation shall not be extended by the connection of one disability with another; and, when the law of limitation shall begin to run, it shall continue to run, notwithstanding any supervening disability of the party entitled to sue or liable to be sued."

The trouble with respondents' argument is that Article 5544 is a part of Title 91, just as is Article 5526, and 5517 keeps it from applying to incorporated cities. As quoted in our original opinion, "The rights * * * of incorporated cities * * * shall not be barred by *any* of the provisions of this Title, * * *" [Emphasis ours.]

Respondents make the further point that the City of Port Arthur was taking over said Water District No. 11

for the purpose of engaging in a proprietary enterprise and that Article 5517 should not be construed to immunize the city from the statutes of limitation in such a situation. They say that to do so would cause the statute to conflict with the equal protection of the law provisions of the Texas and United States Constitutions. They argue that the statute, as we have construed it, exempting cities from the effect of the limitation statutes in Title 91 is an unreasonable classification and is unconstitutional. They cite us to no cases so holding and we have not found any. We have concluded that the classification is not unreasonable.

We overrule respondents' motion for rehearing.

Opinion delivered:
January 19, 1966

APPENDIX B

MOTION FOR REHEARING IN THE SUPREME COURT OF TEXAS

Come now the Respondents in the above entitled and numbered cause and respectfully move the Court to grant Respondents a rehearing herein and upon such rehearing, to set aside the judgment and order of this Court rendered on the 28th day of July, 1965, reversing the judgment of the trial court and the Court of Civil Appeals and remanding the case to the court below for trial, and for such Motion for Rehearing, Respondents allege:

POINTS OF ERROR

POINT OF ERROR NO. ONE

Under the provisions of Article 5517 of the 1925 Revised Civil Statutes of Texas which provide perpetual insulation and immunization of the right provided for in said Article, cannot operate so as to present a continuous obstruction to the running of the statute of limitations where the two-year statute of limitations had already begun to run against the purported cause of action of the Petitioner at the time Petitioner alleges its right to assert said cause of action accrued, therefore, this Honorable Court erred in not holding that the purported cause of action asserted by Petitioner was barred by the two-year statute of limitations.

POINT OF ERROR NO. TWO

This Honorable Court having found that the statute of limitation had begun to run against the alleged cause of

action while the same was owned by the Jefferson County Water Control & Improvement District No. 11, therefore, no disability arising in ownership of said cause of action after the statute of limitations had once begun to run would suspend the running of the statute of limitations, and this Honorable Court erred in holding that the provisions of Article 5517 perpetually immunized and insulated the Petitioner from the running of the two-year statute of limitations that had already begun at the time Petitioner alleges its right to assert its purported cause of action and upon such holding reversed the judgment of the trial court and the Court of Civil Appeals.

POINT OF ERROR NO. THREE

This Honorable Court erred in holding that the right of the Petitioner set out in Article 5517 of the 1925 Revised Civil Statutes of Texas applied to the Petitioner acting in its proprietary capacity and function.

POINT OF ERROR NO. FOUR

Article 5517 of the 1925 Revised Civil Statutes of Texas perpetually insulates and exempts the Petitioner from the effect and force of the two-year statute of limitations and denies to Respondents such insulation and exemption, thereby denying to Respondents "equal protection of law" and "due process of law" secured to them under the Fourteenth Amendment to the Constitution of the United States, and this Honorable Court erred in reversing the judgment of the trial court and the Court of Civil Appeals.

POINT OF ERROR NO. FIVE

Article 5517 of the 1925 Revised Civil Statutes of Texas gives to the Petitioner perpetual exemption and immunization against the running of the two-year statute of limitations, and denies to the Respondents such exemption and immunization, thereby denying the Respondents equal exemption and immunization against the effect of the two-year statute of limitations under the same or similar circumstances and conditions, and, therefore, denies to the Respondents "equal protection of law" and "due process" secured to them under the Fourteenth Amendment to the Constitution of the United States, and this Honorable Court erred in reversing the judgment of the trial court and the Court of Civil Appeals.

POINT OF ERROR NO. SIX

Article 5517 of the 1925 Revised Civil Statutes of Texas, which perpetually immunizes and insulates the Petitioner against access by the Respondents to the courts and withholds such insulation, right and exemption from the Respondents under like conditions, similar circumstances and charges, is an unreasonable, arbitrary and unsubstantial classification and constitutes discriminatory action in violation of "equal protection of laws" secured to Respondents under Article 1, subsection 3 of the Texas Constitution and the Fourteenth Amendment to the Constitution of the United States, and this Honorable Court erred in reversing the judgment of the trial court and the Court of Civil Appeals.

POINT OF ERROR NO. SEVEN

The terms of Article 5517 of the 1925 Revised Civil Statutes of Texas as applied to the cause of action alleged and to these Respondents, is unconstitutional and void, in that it denies to the Respondents "equal protection of laws" and "due process" secured to them under Article 1, subsection 3 of the Texas Constitution and under the Fourteenth Amendment to the Constitution of the United States, therefore, this Honorable Court erred in reversing the judgment of the trial court and the Court of Civil Appeals.

POINT OF ERROR NO. EIGHT

Jefferson County Water Control & Improvement District No. 11 having acquired its purported right under a quit claim deed, acquired only such right and equity as the Respondents Harrell G. Tillman and D. D. Tillman had in the subject-matter, and said Water District having no cause of action against the Respondents under said quit claim deed, the Petitioner acquired no right of action thereunder, and the Petitioner having stepped aside from its governmental function in acquiring the right which the Water District had, Petitioner in its proprietary function is governed by the same rules and laws which governed the Respondents, engaged in the same type and character of business, therefore, this Honorable Court erred in reversing the judgment of the trial court and the Court of Civil Appeals.

POINT OF ERROR NO. NINE

This Honorable Court erred in holding that the Petitioner is entitled to maintain its cause of action as alleged against the Respondent Mack H. Hannah, Jr., for the reason that the right claimed by the Petitioner to its alleged cause of action, is a right claimed while it was acting in a proprietary capacity, and that the act of fraud charged against Respondent Mack H. Hannah, Jr. is the selling of the water lines on facilities, which occurred, on the face of the petition, on the 16th day of August, 1956, and more than two (2) years prior to the date Petitioner claimed any right of action or interest in the subject-matter of this lawsuit.

The name and residence of counsel for the Petitioner are:

Carey Young, City Attorney
P. O. Box 1089
Port Arthur, Texas

WHEREFORE, Respondents pray that this their Motion for Rehearing be granted, and that upon rehearing hereof, the judgment of this Court entered herein on the 28th day of July, 1965 reversing the judgment of the trial court and the Court of Civil Appeals and remanding the case to the trial court below for trial be set aside and the judgment of the trial court and the Court of Civil Appeals be in all things affirmed, and for such other relief as the law and the facts require.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the attached and foregoing

seven (7) pages contain a true and correct copy of the respondents' motion for rehearing in the case of The City of Port Arthur v. Harrell G. Tillman et al., No. A-10,444, From Jefferson County, Sixth District, as the original of same appears of record on file in this office.

IN TESTIMONY WHEREOF, Witness my hand and the Seal of the Supreme Court of Texas, at the City of Austin, on this 7th day of March, 1966.

GEO. H. TEMPLIN, CLERK

By Eugene Cervenka, Deputy

APPENDIX C

Text of Texas Statutes Involved

ARTICLE 1119, 1925 REVISED CIVIL STATUTES OF TEXAS: (Official Vol. 2A, p. 665)

The governing body of all incorporated cities and towns in this State incorporated under the General Laws thereof shall have the power to regulate, by ordinance, the rates and compensation to be charged by all persons, companies, or corporations using the streets and public grounds of said city or town, and engaged in furnishing water, gas, telephone, light, power, or sewerage service to the public, and also to prescribe rules and regulations under which such commodities shall be furnished, and service rendered, and to fix penalties to enforce such charges, rules, and regulations. The governing body shall not prescribe any rate or compensation which will yield more than a fair return upon the fair value of the property used and useful in rendering its service to the public, but which return in no event shall ever exceed eight (8) per cent per annum.

ARTICLE 4477-1, Sec. 1(e), 1925 REVISED CIVIL STATUTES OF TEXAS: (Official Vol. 12A, p. 400)

(e) DRINKING WATER: All water distributed by any agency or individual, public or private, for the purpose of human consumption or which may be used in the preparation of foods or beverages or for the cleansing of any utensil or article used in the course of preparation or consumption of food or beverages for human beings. The term "Drinking Water" shall also include all water supplied for human consumption or used by any institution catering to the public.

ARTICLE 4477-1, Sec. 11 (a), 1925 REVISED CIVIL STATUTES OF TEXAS: (Official Vol. 12A, p. 405)

(a) No district, municipality, firm, corporation, or individual shall furnish to the public any drinking water for which any charge is made, unless the production, processing, treatment, and distribution is at all times under the supervision of a competent water works operator holding a valid certificate of competency issued under direction of the Texas State Department of Health.

ARTICLE 5517, 1925 REVISED CIVIL STATUTES OF TEXAS: (Official Vol. 16, p. 609)

The right of the State, all counties, incorporated cities and all school districts shall not be barred by any of the provisions of this Title, nor shall any person ever acquire, by occupancy or adverse possession, any right or title to any part or portion of any road, street, alley, sidewalk, or grounds which belong to any town, city, or county, or which have been donated or dedicated for public use to any such town, city, or county by the owner thereof, or which have been laid out or dedicated in any manner to public use in any town, city or county in this State.

ARTICLE 5526, 1925 REVISED CIVIL STATUTES OF TEXAS: (Official Vol. 16A, p. 11)

There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions of trespass for injury done to the estate or the property of another.

2. Actions for detaining the personal property of another, and for converting such property to one's own use.

3. Actions for taking or carrying away the goods and chattels of another.

4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

5. Actions upon stated or open accounts, other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents. In all accounts, except those between merchant and merchant, as aforesaid, their factors and agents, the respective times or dates of the delivery of the several articles charged shall be particularly specified, and limitation shall run against each item from the date of such delivery, unless otherwise specially contracted.

6. Action for injury done to the person of another.

7. Action for injury done to the person of another where death ensued from such injury; and the cause of action shall be considered as having accrued at the death of the party injured.

8. Actions for forcible entry and forcible detainer.

ARTICLE 5544, 1925 REVISED CIVIL STATUTES OF TEXAS: (Official Vol. 16A, p. 269)

The period of limitation shall not be extended by the connection of one disability with another; and, when the law of limitation shall begin to run, it shall continue to run, notwithstanding any supervening disability of the party entitled to sue or liable to be sued.

ARTICLE 7880-125, 1925 REVISED CIVIL STATUTES OF TEXAS: (Official Vol. 21, pp. 534-535)

Eminent Domain: Districts operating under the provisions of this Act are hereby empowered to acquire all lands, materials, borrow and waste grounds, easements, rights of way and everything deemed necessary, incident, or helpful for the purpose of accomplishing any one or more of the objects authorized for water control and improvement districts, which shall be held to mean the accomplishment of said objects by any practicable mechanical means: They will have the right to acquire all such property by gift, grant, purchase or condemnation: The right to acquire property as herein bestowed shall include property deemed necessary for the extension or enlargement of the plant, works, improvements or service of such districts. Such districts may acquire either the fee simple title to, or an easement upon, all lands, both public and private, either within or beyond the boundaries, and may require the title to, or an easement upon, property other than lands held in fee: Such districts may so acquire such lands, easements or other property by gift, purchase or condemnation, and in case of such condemnation, the district may elect to condemn either the fee simple title, or an easement only, as is elsewhere provided in this Act. Such districts shall have the right to operate all such plants, works and improvements, and to contract for the use of its water, power, or other facilities, or service, by another, either within or beyond the boundaries of the district; provided no such contract shall be made in such manner as to im-

pair the ability of the district to serve lawful demands for service within such district. Any property acquired may be conveyed to the United States of America, in so far as the same may be necessary for the construction, maintenance and operation of works, for the benefit of the district, by the United States under contract.